

PSI INCONTROL SDN BHD v. IRCON INTERNATIONAL LTD

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COURT OF APPEAL, PUTRAJAYA
VAZEER ALAM MYDIN MEERA JCA
LEE HENG CHEONG JCA
MARIANA YAHYA JCA

[CIVIL APPEAL NO: W-02(NCVC)(W)-2168-11-2019]
1 MARCH 2022

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Abstract – *An extension of time under a construction contract issued by a project director may go to show that the project director has formed an opinion on the cause and length of delay and the justification for the extension. More, in granting such an extension, the main contractor must have decided that the subcontractor is entitled to it; hence, whilst in a claim for losses and expenses thereof the subcontractor must comply with the necessary clauses in the agreement, the main contractor cannot back track and refuse to entertain any such claims by the subcontractor.*

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CONTRACT: *Construction contract – Losses and expenses – Claim for – Claim by subcontractor against main contractor for losses and expenses pertaining to extension of time granted by main contractor – Wrongful deduction of sums by main contractor – Whether subcontractor complied with conditions precedent in conditions of contract – Whether subcontractor provided notice of intention to claim losses and expenses – Whether subcontractor submitted particulars that may be necessary to enable claims to be ascertained – Whether there was lack of judicial appreciation of evidence and misdirection*

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This was an appeal by the appellant ('plaintiff') against part of the Judicial Commissioner's ('JC') judgment, dismissing the plaintiff's claim for losses and expenses pertaining to an extension of time ('EOT') granted by the respondent ('defendant') in a construction contract. The defendant was the main contractor in the said construction contract while the plaintiff was the defendant's subcontractor. The subcontract consisted of, *inter alia*, a letter of acceptance ('LOA') and the Conditions of Contract for Design and Build Contract PWD Form DB (Rev. 2007) ('COC'). Under the subcontract: (i) the commencement date was 15 days from the letter of acceptance date *ie*, 17 April 2010 and the completion period was 20 months from the LOA *ie*, 2 December 2011 ('original completion date'); (ii) the agreed liquidated damages payable for any delay to the original completion date were set out in cl. 45 of the COC; (iii) the procedures governing a claim for EOT were set out in cl. 49.1 of the COC; (iv) the plaintiff was only entitled to claim for direct loss and expenses ('losses and expenses') incurred arising out of delay events under cls. 49.1(b), (d), (e), (h) or (i) of the COC; and (v) the procedures governing such a claim for the losses and expenses were set out

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- A in cls. 50.1 and 50.2 of the COC. Non-compliance with the mandatory requirements thereunder shall discharge the defendant from any liability arising therefrom. At the High Court, the plaintiff claimed for the following:
- B (i) the sum of RM373,683 being the wrongful deduction by the defendant in respect of Network Data Works; (ii) the sum of RM7,736,145 for the EOT claim. In the alternative, the sum of RM4,852,487 for the EOT claim; and (iii) interests, costs and reliefs deemed fit and proper by the court. The JC allowed the plaintiff's claim for the sum of RM373,683 for the wrongful deduction by the defendant in respect of the Network Data Works but dismissed the plaintiff's claim for the EOT. The JC found, *inter alia*, that the
- C plaintiff failed to comply with the conditions precedent in cls. 49, 50.1 and 50.2, and that notwithstanding the defendant having granted an EOT under cl. 49, the plaintiff was not entitled to claim for the losses and expenses because they failed to: (i) comply with cl. 49 of the COC; (ii) provide notice of intention to claim the losses and expenses under cl. 50.1 of the COC; and
- D (iii) submit particulars that may be necessary to enable the claims to be ascertained under cl. 50.2 of the COC. In this appeal, the plaintiff contended that (i) they have obtained an EOT to complete the project works namely by an Extension of Time Certificate No. 1 ('EOT No. 1') and was entitled to claim for the losses and expenses; and (ii) the JC reached the conclusion on the plaintiff's EOT claim based on a mistaken and erroneous interpretation of cls. 49 and 50 of the COC.
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Held (allowing appeal)**Per Lee Heng Cheong JCA delivering the judgment of the court:**

- (1) EOT No. 1 was granted on 26 March 2012 and was signed by the project director, granting an EOT from 2 December 2011 which was the initial completion date until 31 July 2013, for a period of 606 days. This showed that the project director must have formed an opinion as early as 26 March under cl. 49 of the COC as to firstly, the cause of delay and secondly, the length of the delay. Only then would the project director be in a position to issue EOT No. 1. Thus, the fact that an EOT of 606 days was granted showed that the project director must have been satisfied that all the pre-conditions of cl. 49 had been fulfilled. There was also corroborative evidence which showed that when the plaintiff gave their notice of delay on 2 March 2012 and this gave notice of intention to claim the losses and expenses, as required by cl. 50.1 of the COC. (paras 27 & 28)
- (2) The defendant's refusal to entertain claims for losses and expenses when granting an EOT could only be justified if the defendant had expressly stated that the cause or causes of delay did not fall under cl. 49.1(b), (d), (e), (h) or (i) of the COC. Clause 49 did not (i) allow the defendant to unilaterally impose a blanket refusal to entertain any claims arising from the EOT; and (ii) empower the defendant to reserve its rights to reject the plaintiff's claim for the losses and expenses once the defendant

- granted EOT No. 1. In granting EOT No. 1, the defendant must have decided that the plaintiff was entitled to EOT and to claim for the losses and expenses and the defendant was bound with the said cl. 49. Therefore, the defendant was in breach of cl. 49 when it refused to entertain the plaintiff's claim for the losses and expenses without having first made any decision that the causes of delay did not fall under cl. 49.1(b), (d), (e), (h) or (i) of the COC. (paras 31-34) A
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- (3) Pursuant to cl. 50.1 of the COC, the plaintiff was only required to provide notice of intention to claim additional payment within 60 days of the occurrence of the delaying event. Pursuant to cl. 50.2 of the COC, the plaintiff was required to substantiate its claim for the losses and expenses with full particulars, together with supporting documents not later than 90 days after the practical completion of works and there was no dispute that practical completion of works was on 21 August 2013. It was however, only officially notified to the plaintiff on 20 August 2015, some two years later. (paras 36 & 38) C
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- (4) The JC had misdirected herself and erred in law by concluding that the plaintiff failed to comply with cls. 50.1 and 50.2 of the COC. The JC's findings clearly did not take into account of the contents of the plaintiff's notice of delay dated 2 March 2012, which clearly stated 'We will be submitting our claim for EOT covering all direct and indirect cost in line with our contract subsequent to this letter'. Further, the JC's finding that cl. 50.3 of the COC was erroneous. The said cl. 50.3 had no application because it excluded claims only when both sub-cls. 50.1 and 50.2 of the COC were not complied with whereas in the present appeal, it was obvious that the said sub-cls. 50.1 and 50.2 had been complied with. (paras 46-48) E
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- (5) In so far as the JC's finding that the plaintiff did not submit the necessary particulars to enable their claims to be ascertained under cl. 50.2 was concerned, this was erroneous as the plaintiff's claim which was submitted under the letter dated 17 April 2012 together with the relevant particulars and documents for RM7,737,145.52 for the losses and expenses was included in bundle A of the agreed bundles of documents for trial, as agreed and admitted documents. The placement of these documents in Part A meant that the making, authenticity and contents of these letters and documents were admitted. Thus, the contents of these documents were therefore not open to challenge by the defendant. (para 50) G
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- (6) The JC erred in fact and in law in dismissing the plaintiff's claim for losses and expenses pursuant to the EOT that was granted by the defendant. There was also a clear lack of judicial appreciation of evidence and misdirection by the JC in coming to her decisions. The judgment and order of the JC in respect of dismissal of the plaintiff's I

- A claim for loss and expenses arising from the EOT was set aside. Judgment was entered for the appellant in the sum of RM7,736,145 together with interest and costs. The decision of the High Court was varied accordingly. (para 55)

Case(s) referred to:

- B *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309 FC (*refd*)
Lee Ing Chin & Ors v. Gan Yook Chin & Anor [2003] 2 CLJ 19 CA (*refd*)
Ming Holdings (M) Sdn Bhd v. Syed Azahari Noh Shahabudin & Anor [2010] 6 CLJ 857 FC (*refd*)
- C *For the appellant - Nahendran Navaratnam, Balvinder Singh Kenth & Gurmeh Kaur*
For the respondent - Rodney Gomez & Michelle Lim
- [Editor's note: Appeal from High Court, Kuala Lumpur; Civil Suit No: WA-22NCVC-525-10-2017 (overruled).]
Reported by Lina E

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JUDGMENT

Lee Heng Cheong JCA:

Introduction

- E [1] This an appeal by the appellant/plaintiff against part of the learned Judicial Commissioner's ("the learned JC") judgment, dismissing the plaintiff's claim for loss and expense pertaining to an extension of time granted by the respondent/defendant in a construction contract.
- F [2] The appellant/plaintiff, being aggrieved, appealed. Hence this appeal before us, which we heard and unanimously allowed for the following reasons.
- [3] For ease of reference, parties will be referred to as they were in the proceedings before the High Court.

G **Background**

- [4] The disputes arose out of a construction contract between the defendant who is the main contractor and the plaintiff who is the defendant's subcontractor for the construction and completion of the works relating to "the Electrified Double Track project between Seremban (KM 461.234) to Gemas (KM 564.000) Stations" ("project"). The Government of Malaysia is the project owner.
- H [5] *Vide* a letter of acceptance dated 2 April 2010 ("LOA") (found at CB 3, pp. 539 to 541), the defendant appointed the plaintiff to complete the works stated in Annexure B to the LOA ("works") ("subcontract").
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[6] The subcontract documents consist of, *inter alia*, the LOA and the conditions of contract for design and build contract PWD Form DB (Rev. 2007) ("COC") (found at CB 2, pp. 264 to 328). A

[7] The material terms of the subcontract are as follows:

- (i) The commencement date is 15 days from the LOA date, *ie*, by 17 April 2010. The completion period is 20 months from the LOA date, *ie*, by 2 December 2011 ("original completion date") (CB 3, p. 541). B
- (ii) The agreed liquidated damages payable for any delay to the original completion date are set out in cl. 45 of the COC (CB 2, p. 306). C
- (iii) The procedures governing a claim for extension of time ("EOT") are set out in cl. 49.1 of the COC (CB 2 p. 308 to 309). C
- (iv) The plaintiff is only entitled to claim for direct loss and expenses ("losses and expenses") incurred arising out of delay events under cls. 49.1(b), (d), (e), (h) or (i) of the COC (cl. 49.2 of the COC) (CB 2 p. 309). D
- (v) The procedures governing such a claim for the losses and expenses are set out in cl. 50.1 and 50.2 of the COC. Non-compliance with the mandatory requirements thereunder shall discharge the defendant from any liability arising therefrom (cl. 50.3 of the COC) (found at CB 2, p. 310). E

[8] In this case, the plaintiff claims for the followings:

- (i) the sum of RM373,683 being the wrongful deduction by the defendant in respect of Network Data Works; F
- (ii) the sum of RM7,736,145 for the EOT claim;
- (iii) in alternative to para. 8.2 above, the sum of RM4,852,487 for the EOT claim;
- (iv) interests on all sums awarded at the rate and for the period deemed appropriate by the court; G
- (v) costs; and
- (vi) any further and/or other reliefs deemed fit and proper by the court.

[9] After a full trial, the learned JC allowed the plaintiff's claim for the sum of RM373,683 for the wrongful deduction by the defendant in respect of the Network Data Works but dismissed the plaintiff's claim for the EOT. H

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A The Findings Of The High Court

[10] The learned JC found, *inter alia*, that the plaintiff had failed to comply with the conditions precedent in cls. 49, 50.1 and 50.2 of the COC and that notwithstanding the defendant having granted an extension of time under the said cl. 49, the plaintiff was not entitled to claim for the losses and expenses because they had failed to:

- B (i) comply with cl. 49 of the COC;
- (ii) provide notice of intention to claim the losses and expenses under cl. 50.1 of the COC; and
- C (iii) submit particulars that may be necessary to enable the claims to be ascertained under cl. 50.2 of the COC.

The Plaintiff's Contentions

D [11] The plaintiff contended, *inter alia*, that they have obtained an extension of time to complete the project works namely by an Extension of Time Certificate No. 1 ("EOT No. 1") and entitled to claim for the losses and expenses.

E [12] The plaintiff also contended in essence that the learned JC reached her conclusion on the plaintiff's EOT claim based on a mistaken and erroneous interpretation of cls. 49 and 50 of the COC.

The Defendant's Contentions

F [13] The defendant in turn contended *inter alia* that the plaintiff has failed to comply with several aspects of cl. 49 of the COC as determined by the learned JC namely:

- (i) the failure to apply "forthwith" as required under cl. 49 of the COC;
- (ii) the failure to specify the particular sub-clause which they are relying on, in their EOT application;
- G (iii) the plaintiff's losses were based on projected losses and thus, failed to comply with cl. 49.2 of the COC;
- (iv) the delay was caused by late delivery of site possession which is not a ground for claiming the losses and expenses; and
- H (v) the failure to mitigate the delay.

I [14] The defendant thus argued that this was supported by the learned JC's finding that the plaintiff's claim for the losses and expenses is based on mere "anticipated, projected and/or forecasted costs which were never incurred, *ie*, not direct loss and expense and therefore, clearly not in accordance with the provision under cl. 49 of the COC". (See grounds of judgment ("GOJ") - paras. 45, 47 and 49 at CB 1, 194, 195 and 197).

[15] The defendant also contended that the learned JC's findings are justified and supported by PW1's admission that the plaintiff's claim of RM7,736,145 is based on anticipated costs. On this basis alone, the defendant contends that the plaintiff's claim for loss and expenses must be dismissed.

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The Applicable Law And Principles

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[16] It is trite law that the specific finding of facts by the learned JC as a trier of facts should not be disturbed by an appellate court such as this court herein unless that finding was plainly wrong: See *Ming Holdings (M) Sdn Bhd v. Syed Azahari Noh Shahabudin & Anor* [2010] 6 CLJ 857; [2010] 4 MLJ 577; (FC) paras. 41 to 48.

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[17] We were mindful of the limited role of the appellate court in relation to findings of facts made by the court of first instance. In the case of *Lee Ing Chin & Ors v. Gan Yook Chin & Anor* [2003] 2 CLJ 19; [2003] 2 MLJ 97 where the Court of Appeal held as follows:

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... an appellate court will not, generally speaking, intervene unless the trial court is shown to be plainly wrong in arriving at its decision. **But appellate interference will take place in cases where there has been no or insufficient judicial appreciation of the evidence.**

(emphasis added)

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[18] Reference is also made to the decision of the Federal Court in *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309 where the Federal Court held that the test of "insufficient judicial appreciation of evidence" adopted by the Court of Appeal was in relation to the process of determining whether or not the trial court had arrived at its decision or findings correctly on the basis of the relevant law and the established evidence.

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Findings Of This Court

[19] Bearing in mind the above principles, we will now consider the plaintiff's appeal.

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[20] We noted that the learned JC, at para. 35 of her grounds of judgment held *inter alia* that:

It is an undisputed fact that EOT No. 1 was granted by the defendant in accordance with cl. 49 of the COC vide its letter dated 26 March 2012 ... nevertheless, from the evidence and in the same letter, the Court finds that the defendant has clearly stated that the extension of time will not enable the plaintiff to claim compensation by way of claim/any additional costs to defendant. Plaintiff has failed to fulfil the requirements for the EOT claim pursuant to cl. 49 of the COC.

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(emphasis added)

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- A [21] We are of the considered view that this material finding by the learned JC was inherently contradictory and erroneous in that notwithstanding having held that EOT No. 1 had been granted under cl. 49 of the COC, the learned JC could not then have held that there was non-compliance with the said cl. 49. Thus, we find that this is a serious misdirection and that there is no proper judicial appreciation of the evidence.
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[22] Clause 49.1 of the COC provides as follows:

- C Upon it becoming reasonably apparent that the progress of the Works is delayed, the Contractor shall forthwith give written notice to the officer named in **Appendix 1 as to the causes of delay and relevant information with supporting documents enabling the said officer to form an opinion as to the cause and the length of delay.** If in the opinion of the said officer the completion of the Works is likely to be delayed or has been delayed beyond the Date for Completion stated in Appendix 1 or beyond any extended Date for Completion previously fixed under this clause ...
- D (the 10 limbs of delaying events are then set out)

- ... then the officer named in Appendix 1 may, **if he is of the opinion that an extension of time should be granted, so soon as he is able to estimate the length of the delay beyond the date or time aforesaid issue** a Certificate of Delay and Extension of Time giving a fair and reasonable extension of time for completion of the Works.

- E PROVIDED THAT the Contractor has taken all reasonable steps to avoid or reduce such delay and shall do all that may reasonably be required to the satisfaction of the PD to proceed with the Works.

- F PROVIDED FURTHER THAT the Contractor shall not be entitled to any extension of time where the instructions or acts of the Government or the PD are necessitated by or intended to cure any default or breach of contract by the Contractor.

(emphasis added)

- G [23] The learned JC having made a determination that EOT No. 1 was granted pursuant to cl. 49.1 of the COC could not have then subsequently held that the plaintiff had not complied with the said cl. 49. This is a clear misdirection.

- H [24] From the evidence adduced, we find that the plaintiff had submitted particulars of its claim for EOT under cover of the said letter dated 17 April 2012. This letter complied with cl. 50.2 of the COC, in that the plaintiff furnished particulars and supporting documents necessary to enable the plaintiff's claims to be ascertained by the project director. PW1 testified that full details of the EOT claim for the sum of RM7,736,145 was submitted and acknowledged receipt by the defendant. DW1 stated that the project director did not make any determination on the EOT claim and that there was also no letter from the defendant challenging the plaintiff's claim or the calculation for the EOT claim. Hence, the plaintiff's claim of RM7,736,145 for EOT remained unchallenged until this writ was filed.
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[25] Clause 49.2 of the COC then provides as follows:

If during the regular progress of the Works or any part thereof has been materially affected by reason of delays as stated under clause 49.1(b), (d), (e), (h) and (j) hereof (and no other), and the Contractor has incurred or is likely to incur direct loss and/or expense beyond that reasonably contemplated and for which the Contractor would not be reimbursed by a payment made under any other provision in this Contract, **then the Contractor shall be entitled to claim for such direct loss and/or expense incurred, subject always to clause 50.**

(emphasis added)

[26] The pre-conditions of cl. 49.1 of the COC are as follows:

- (i) it must be reasonably apparent that the works in question have been delayed;
- (ii) notice must be given as to the causes of delay and relevant information with supporting documents;
- (iii) the relevant information with supporting documents must enable the officer to form an opinion as to the cause and length of delay;
- (iv) the officer must then form an opinion whether the cause or causes of delay fall under any of the ten limbs in the said cl. 49.1; and
- (v) the officer may then grant an extension of time as soon as he is able to estimate the length of delay.

[27] We find that EOT No. 1 was in fact granted on 26 March 2012 and was signed by Parmod Kumar as the project director, granting an extension of time from 2 December 2011 which is the initial completion date until 31 July 2013, for a period of 606 days. This showed that the project director must have formed an opinion as early as 26 March 2012 under cl. 49 of the COC as to firstly, the cause of delay and secondly, the length of delay. Only then would the project director, be in a position, to issue EOT No. 1. Thus, we find that, the fact that an extension of time of 606 days was granted, shows that the project director must have been satisfied that all the pre-conditions of the said cl. 49 have been fulfilled.

[28] We further find corroborative evidence which shows that when the plaintiff gave their notice of delay on 2 March 2012, it identified the delaying events as the second phase station building and outdoor infrastructure works still being under construction and the absence of the master implementation plan ("MIP") in connection with these works. The said notice of delay applied for an extension of time and gave notice of intention to claim the losses and expense as required by cl. 50.1 of the COC.

- A [29] We also find that the facts supporting the said notice of delay were further corroborated by the oral evidence adduced during trial, namely:
- (i) PW1 testified that the MIP Rev 04 was only received on 5 February 2012 and this was the reason why the plaintiff issued its request for extension of time under the said notice of delay dated 2 March 2012;
 - B (ii) the MIP was a crucial document which lays down the schedule of works for the defendant, which is the main contractor which in turn would enable the plaintiff to plan and manage its own work program;
 - C (iii) Sengottuvel Velavan (DW1) in his testimony, admitted that the MIP was only received on 5 February 2012, after the original contract period had lapsed; and
 - (iv) The said notice of delay clearly stated that the plaintiff's works had been disrupted and that additional resources and expenditures would be incurred for the extended completion date as stated in MIP Rev 04.
- D [30] Even though, an extension of time of 606 days was granted in EOT No. 1, the defendant contended that EOT No. 1, however, impose a comprehensive denial of any claims for compensation by the plaintiff whereby the defendant stated that the extension of time was "... granted up to 31 July 2013, in accordance with cl. 49 of the COC without levy of liquidated damages but on the specific stipulation that this extension will not enable you to any compensation by way of a claim/any additional cost to IRCON."
- E [31] We are of the considered view that the defendant's refusal to entertain claims for loss and expense when granting an extension of time can only be justified if the defendant had expressly stated that the cause or causes of delay did not fall under cl. 49.1(b), (d), (e), (h) or (i) of the COC.
- F [32] We agree with counsel for the plaintiff that the said cl. 49 does not allow the defendant, to unilaterally impose a blanket refusal to entertain any claims arising from the EOT. Pursuant to the said cl. 49, the project director must make a determination as to which of the limbs in the said cl. 49.1 that the EOT is allowed. The notice of delay dated 2 March 2012 submitted by the plaintiff requesting for the EOT was well within the time stipulated in the said cl. 50.1, and in it, the plaintiff had expressly stated: "We will be submitting our claim for EOT covering all direct and indirect cost in line with our contract subsequent to this letter." Hence, the plaintiff had given the defendant, proper notice of their intention to claim for the losses and expenses.
- G [33] We are also of the respectful view that the said cl. 49 does not empower the defendant, to reserve its rights to reject the plaintiff's claims for the losses and expenses once the defendant grants EOT No. 1. In granting
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EOT No. 1, the defendant must have decided that the plaintiff is entitled to EOT and to claim for the losses and expenses and the defendant is bound to comply with the said cl. 49.

[34] Thus, we find that the defendant was in breach of the said cl. 49.2 when it refused to entertain the plaintiff's claims for the losses and expenses without having first made any decision that the causes of delay did not fall under cl. 49.1(b), (d), (e), (h) or (i) of the COC.

[35] Clause 50 of the COC provides as follows:

PROCEDURE FOR CLAIMS

50.1 Notwithstanding any other provision of the Contract, if the Contractor intends to claim any additional payment pursuant to any clause of this Contract, the Contractor shall within sixty (60) days of the occurrence of such event or circumstances or instructions give notice in writing to the P.D of this intention for such claim.

50.2 *As soon as is practicable but not later than ninety (90) days after practical completion of the Works, the Contractor shall submit full particulars of the claims under clause 50.1 together with all supporting documents, vouchers, explanations, calculations, records and receipts for payment made which may be necessary to enable the claims to be ascertained by the PD. Upon expiry of the ninety (90) days period, the P.D shall proceed to ascertain the claims based on such documents submitted by the Contractor. The amount of such claims ascertained by the P.D shall be added to the Contract Sum.*

50.3 *If the Contractor fails to comply with clause 50.1 and clause 50.2, he shall not be entitled to such claim and the Government shall be discharged from all liability in connection with the claim.*

(emphasis added)

[36] We are of the considered view that pursuant to cl. 50.1 of the COC, the plaintiff is only required to provide notice of intention to claim additional payment within 60 days of the occurrence of the delaying event.

[37] There is no dispute that the delaying event was the late provision and receipt of MIP Rev 04 on 5 February 2012. Thus, the time limit of 60 days would, therefore, have expired on 5 April 2012. The said notice of delay was dated 2 March 2012 and it expressly stated, "We will be submitting our claim for EOT covering all direct and indirect cost in line with our contract subsequent to this letter". Thus, we are of the view that the plaintiff's notice of intention to claim loss and expense had, therefore, been given well before the 60 days' time limit in cl. 50.1 of the COC.

[38] In our considered view, cl. 50.2 of the COC requires the plaintiff to substantiate its claims for the losses and expenses, with full particulars, together with supporting documents not later than 90 days after the practical completion of works and we find that there is no dispute that practical completion of works was on 21 August 2013. It was however, only officially notified to the plaintiff on 20 August 2015, some two years later.

- A [39] By that time, the plaintiff had already submitted particulars of their claims by a letter dated 17 April 2012 which was acknowledged by the defendant, on 5 May 2012. We find that this letter complied with cl. 50.2 of the COC in that it furnished particulars and supporting documents necessary to enable the claims to be ascertained by the project director. PW1
- B testified that full details of the EOT claim for the sum of RM7,736,145 was submitted.
- [40] We also noted that DW1 in his testimony, admitted that the particulars of the plaintiff's claim for the losses and expenses were given together with calculations and explanations but stated that they were not full
- C particulars. DW1, nevertheless, also stated that no decision was ever made by the project director on the claims and that there was no letter from the defendant challenging the plaintiff's calculations of the losses and expenses.
- [41] From our perusal of cl. 50.2 of the COC, we find that this sub-clause merely requires the plaintiff to submit "full particulars of the claims under
- D cl. 50.1 together with all supporting documents, vouchers, explanations, calculations, records and receipts for payment made which may be necessary to enable the claims to be ascertained by the project director." It does not require the plaintiff to furnish complete particulars. We find that the attachments to the plaintiff's letter dated 17 April 2012 provided sufficient
- E full particulars and supporting documents for their claims to be ascertained. We further find that cl. 50.3 does not apply to this case because it only excludes a claim if the plaintiff had failed to comply with both cl. 50.1 and 50.2 of the COC.
- [42] On the issue of whether there is a need for the plaintiff to identify
- F which limb of cl. 49 of the COC that they are relying on, for the extension of time, we are of the considered view that there is no requirement under the said cl. 49 for the plaintiff to identify which limb of cl. 49.1 applies to their application for extension of time. We find that the said cl. 49.1 requires the project director to, firstly, identify the cause of delay and decide which one
- G of the ten limbs in the said cl. 49.1 applies before he grants the extension of time. Thus, in granting the extension of time on 26 March 2012, the project director must have known which limb he relied upon even though EOT No. 1 did not identify which of the ten limbs of delay under cl. 49.1 of the COC, was relied upon by the defendant in granting the said extension of time.
- H [43] Clause 49.2 of the COC merely states which types of delay will permit the plaintiff as the defendant's contractor to claim additional cost and expense. If the EOT is granted under limb (b), (d), (e), (h) or (j) of cl. 49, the plaintiff is entitled to make a loss and expense claim.
- I [44] We are of the considered view that the defendant had no justification, after having granted the EOT No. 1, to insist on the plaintiff identifying which limb of the said cl. 49.1 applied to their application for EOT. Before granting EOT No. 1, the project director would have considered firstly, the

cause of delay and secondly, the length of delay. This duty is casted upon the project director by the said cl. 49.1 of the COC. Once the project director has decided to grant an extension of time to the plaintiff, the project director would have considered and decided which limb of the said cl. 49.1 applied to the plaintiff's application for EOT No. 1.

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[45] It is also worth noting that, Velavan (DW1), admitted in cross-examination that the determination of which limb the EOT fell under was a matter for the project director. At p. 817 of the notes of proceedings, this is what DW1 said:

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BSK: Yes, you have to. Now when it comes to 49.2, that is something for the project director or the Officer who is managing the project under IRCON to determine whether the grounds come within subclause (b), (d), (e), (h), and (i). Isn't that correct?

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VELAVAN: Yes.

BSK: Yes. So somebody from IRCON must come and say, your reasons for delay come under ground (b) so you are entitled to a claim. If it comes under the other grounds, we are not entitled to claim. Ok. You agree with that?

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VELAVAN: Yes, these clauses.

[46] Having perused the grounds of judgment of the learned JC, we are of the considered view that she had misdirected herself and erred in law, by concluding at paras. 38 to 43 of her GOJ that the plaintiff had failed to comply with cls. 50.1 and 50.2 of the COC when she held *inter alia* as follows:

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(i) at para. 39 of her GOJ, "that the plaintiff failed to show that there was written notice as to the cause of delay given by the plaintiff to the officer named in appendix 1";

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(ii) at para. 40 of her GOJ, "which the court finds the plaintiff has also failed to comply with cl. 50.1 ...";

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(iii) at para. 40 of her GOJ, "cl. 50.3 of COC clearly provides that "If the contractor fails to comply with cl. 50.1 and cl. 50.2, he shall not be entitled to such claim and the Government shall be discharged from all liability in connection with the claim";

(iv) at para. 41 of her GOJ, "the court is satisfied that the plaintiff has failed to comply with cl. 50.1 and cl. 50.2 of the COC by not submitting its notice of intention to claim within 60 days of the occurrence/event/circumstance giving rise to the delay and the supporting documents to its purported claim for loss and expense"; and

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(v) at para. 43 of her GOJ, "from the facts and evidence, the court is of the opinion that the plaintiff's non-compliance with the conditions precedent, namely cl. 50.1 and 50.2 of the COC would barred the plaintiff's entitlement ...

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- A [47] It is our respectful view that the learned JC's above findings clearly did not take into account of the contents of the plaintiff's notice of delay was dated 2 March 2012 which clearly stated "We will be submitting our claim for EOT covering all direct and indirect cost in line with our contract subsequent to this letter".
- B [48] Further, we find that the learned JC's finding that cl. 50.3 of the COC applies, is erroneous as our respectful view is that the said cl. 50.3 has no application because it excludes claims only when both sub-cl. 50.1 and 50.2 of the COC are not complied with whereas, in the present appeal, it was obvious that the said sub-cl. 50.1 and 50.2 had been complied with.
- C [49] The learned JC was, therefore, also wrong to state as follows at para. 50 of her GOJ as follows:
- On that note, the Court finds that the issue raised by the plaintiff with regard to the placement of documents in Part A is irrelevant for the Court to make any finding as the Court in dismissing the plaintiff's EOT claim, relies purely on the failure on the plaintiff's side to observe the provisions under Clauses 49 and 50 of the COC.
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- E [50] In so far as the learned JC's finding that the plaintiff did not submit the necessary particulars to enable their claims to be ascertained under the said cl. 50.2 is concerned, we are of the considered opinion that this is erroneous as the plaintiff's claim which was submitted under the said letter dated 17 April 2012, together with the relevant particulars and documents for RM7,737,145.52 for the losses and expenses, was included in bundle A of the agreed bundles of documents for trial, as agreed and admitted documents. The placement of these documents in Part A meant that the
- F making, authenticity and contents of these letter and documents were admitted. Thus, the contents of these documents were, therefore, not open to challenge by the defendant.
- G [51] The defendant attempted to remove these and other documents comprised in five volumes of the common bundle of documents which were initially agreed and identified as part A documents to part B documents of the bundles of documents. This was, however objected to by the plaintiff, and ultimately rejected by the learned JC. There has been no challenge by the defendant against the learned JC's ruling in this regard either by way of objection at trial, appeal or cross-appeal. Neither did the defendant file any
- H formal application to properly remove the documents from part A. Therefore, they remained as part A documents.
- I [52] The learned JC also misdirected herself when she held at para. 45 of her GOJ as follows:
- The Court finds that the plaintiff's claim for the sum of RM7,737,145.52 or the alternative sum of RM4,852,487.00 is not supported with any documents as the documents shown by the plaintiff, in the Court's opinion are nothing more than just a projected figure which does not reflect the direct cost incurred as provided under cl. 49 of the COC ...

[53] Such a finding contradicts cl. 49.2 of the COC which expressly utilises the following words “contractor has incurred or is likely to incur direct loss and/or expense”. These words were repeated by the learned JC at para. 49 of her GOJ and still the learned JC held that the plaintiff’s projections were not claimable. This was a serious misdirection and failure to judicially appreciate the evidence adduced because what is likely to be incurred must necessarily involve a projection.

[54] Further, we noted that the plaintiff’s documents supporting their claim of RM7.7 million for the losses and expenses were explained by PW1, by reference to another exhibit which was produced and marked as exh. P1. In fact, DW1, Velavan confirmed in cross-examination that the particulars for the claim of RM7,737,145.52 were sufficient. The following exchange in DW1’s cross-examination is pertinent:

BSK: From page 902 all the way to page 911. There’s some annexures there. 902 to 911. I’m putting it to you Mr Velavan, that by this letter and the annexures, the plaintiff or PSI has done what is required of them to put their claim for the EOT. For EOT 1 to IRCON. They have done what is necessary. They have settle the grounds and provided the basic Information to IRCON.

VELAVAN: Yes. This is the information but should have been applied according to cl. 49, 50, until 60 days in advance. 90 days in advance.

Conclusion

[55] Premised on the reasons enumerated above, we are of the considered opinion that the learned JC had erred in fact and in law in dismissing the plaintiff’s claim for loss and expense pursuant to the extension of time (EOT) that was granted by the defendant. We also find that there has been a clear lack of judicial appreciation of evidence and misdirection by the learned JC in coming to her decision. In the premises, we find that there are merits in the appeal. Therefore, we unanimously allowed the appeal and set aside the judgment and order of the learned HCJ in respect of dismissal of the plaintiff’s claim for loss and expense arising from the EOT (which is the subject matter of this appeal). Judgment is entered for the appellant in the sum of RM7,736,145 together with interest at 4% per annum from date of writ and costs here and below in the sum of RM25,000 subject to payment of allocator and the decision of the High Court is varied, accordingly.